

# EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

JOHN DOE,

Plaintiff,

**V.**

**Civil Action No. 7:21-cv-00378**

VIRGINIA POLYTECHNIC  
INSTITUTE AND STATE  
UNIVERSITY, et al.,

**Defendants.**

**PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY IN  
OPPOSITION TO MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)**

COMES NOW the Plaintiff, John Doe (“Plaintiff” or “Mr. Doe”), and submits this Notice of Supplemental Authority in Opposition to Defendants’ Motion to Dismiss Pursuant to Rule 12(b)(6) in order to bring to the Court’s attention the recent holding in the case of Ortegel v. Va. Polytechnic Inst., Civil Action No. 7:22-cv-00510, 2023 U.S. Dist. LEXIS 207568 (W.D. Va. Nov. 20, 2023), in which the Honorable Elizabeth K. Dillon issued an opinion germane to the issues raised by Defendants’ Motion to Dismiss in this action.

In Ortegel, much like this case, the plaintiff alleged that he was found responsible for sexual harassment and disciplined by Virginia Polytechnic Institute and State University (“Virginia Tech”) and certain of its employees in a manner that violated his due process rights. See id. at \*13–16. Virginia Tech, as it has done here, sought to dismiss Ortegel’s due process claim because, among other things, Ortegel supposedly lacked a property interest in his continued enrollment. See id. at \*30.

The Court, however, found that Ortelgel had plausibly alleged a property interest because Ortelgel had alleged that Virginia Tech maintains a “policy or practice of not disciplining students arbitrarily or without cause.” Id. at \*33. The Court held that this allegation was just as sufficient as the allegation in Doe v. Alger, 175 F. Supp. 3d 646 (W.D. Va. 2016), “that ‘through its policies and

practices, JMU has a system of expelling, suspending, or dismissing students only after a finding of cause.” Id. at \*34–35 (quoting Alger, 175 F. Supp. 3d at 658). Notably, the Court did not hold that a property interest is dependent on whether the institution has never dismissed a student without affording due process, nor did Ortegel make such an allegation. Cf. Memorandum in Support of Motion to Dismiss Pursuant to Rule 12(b)(6), ECF No. 94, at 20, 23 (arguing that this action is distinguishable from Alger because in Alger the plaintiff alleged that JMU never disciplined a student for alleged misconduct without proving cause through a fair and impartial process).

Similar to Ortegel, Plaintiff has alleged “that a student could not be dismissed or otherwise sanctioned by Virginia Tech in the absence of cause following a formal hearing with the procedural guarantees and opportunities provided for by the Student Code of Conduct” and that “Virginia Tech regularly and routinely only dismisses students after a finding is made that the student violated the Student Code of Conduct and in accordance with the procedures of the Student Conduct Process.” Complaint, ECF No. 86, at ¶¶ 83–87. Therefore, Plaintiff should likewise be afforded “the opportunity to prove the legitimacy of his claim to a property right in this case.” Ortegel, supra, at 35.

For these reasons, and those articulated in Plaintiff’s Memorandum in Opposition to Motion to Dismiss (ECF No. 98), this Court should deny Defendants’ Motion to Dismiss.

Respectfully submitted,

John Doe

By: /s/ Daniel J. Martin  
Of Counsel

John P. Fishwick, Jr., Esquire (VSB #23285)  
John.Fishwick@fishwickandassociates.com  
Carrol M. Ching, Esquire (VSB # 68031)  
Carrol.Ching@fishwickandassociates.com  
Daniel J. Martin, Esquire (VSB #92387)  
Daniel.Martin@fishwickandassociates.com  
Fishwick & Associates PLC  
30 Franklin Road SW, Suite 700  
Roanoke, Virginia 24011

(540) 345-5890 Telephone  
(540) 345-5789 Facsimile

**CERTIFICATE OF SERVICE**

I hereby certify that on January 2, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

By: /s/ Daniel J. Martin  
Daniel J. Martin (VSB #92387)  
Fishwick & Associates PLC  
30 Franklin Road SW, Suite 700  
Roanoke, Virginia 24011  
(540) 345-5890 Telephone  
(540) 345-5789 Facsimile  
Daniel.Martin@fishwickandassociates.com